No. 10* 7

IN THE

Supreme Court of the United States

October Term, 1945

THE BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF FOR THE PETITIONERS THE BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS, *et al.* Upon the Questions Propounded by the Order Entered Herein on June 18, 1945

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* Case No. 667, October Term, 1944.

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Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL BRIEF FOR THE PETITIONERS THE BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS, *et al.* Upon the Questions Propounded by the Order Entered Herein on June 18, 1945

(1) The proof requirements of Section 6 of the Norris-LaGuardia Act are the minimum to which a defendant is entitled in a criminal prosecution under the Sherman Act.

It is settled by the decision in *United States* v. *Hutcheson*, 312 U. S. 219, and reiterated in the case of *Allen Bradley Company et al.* v. *Local Union No. 3, International*

* Case No. 667, October Term, 1944.

Brotherhood of Electrical Workers, 89 Law. ed. Advance Opinions 1441, that whether trade union conduct constitutes a violation of the Sherman Act is to be determined by considering that law jointly with the Clayton and Norris-LaGuardia Acts as three "interlacing statutes".

Since the provisions of the Clayton and Norris-LaGuardia Acts have the substantive effect of taking the sting of criminality from the enumerated conduct otherwise condemned by the Sherman Law, we can conceive of no valid reason for denying full application of the jurisdictional and evidentiary rules contained in Section 6. Responent has apparently conceded the proposition by arguing not that the section was inapplicable, but that the requirements of the section were met by the instructions given. (Former Brief for The United States, p. 42 *et seq.*)

Section 2 of the Norris-LaGuardia Act, 29 U. S. C. A. 102, declares the public policy of the United States and recites among other things the necessity for protecting the rights of the worker to organize into unions and engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." It then expressly enacts the sections of the statute which follow as "definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States."

We reach in Section 6 of the Act, 29 U. S. C. A. 106, provisions couched in clear and inclusive terms. It reads:

> "Sec. 106: Member of union when not liable for acts of others. No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of such acts, or ratification of such acts after actual knowledge thereof."

The Section begins as a limitation upon the jurisdiction and authority of the courts of the United States, subject

to exception only upon the degree and character of proof there meticulously specified.

In *Lauf* v. *E. G. Shinner and Co.*, 303 U. S. 323, 330, the Norris-LaGuardia Act is described as being unquestionably within the power of Congress "to define and limit the jurisdiction of the inferior courts of the United States".

The characteristics of Section 6 are well stated in the case of *Cinderella Theater Co.* v. *Sign Writers' Local Union*, 6 F. Supp. 164 (E. D. Mich. 1934), where it is said, p. 171:

> "I conclude that this provision, if not within the power of Congress, already considered, to define and limit the jurisdiction of this court, is, in the language of the Supreme Court in Fong Yue Ting *v.* United States, 149 U. S. 698, at page 729, 13 S. Ct. 1016, 1028, 37 L. Ed. 905, 'within the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government.' To the same effect is Bailey *v.* Alabama, 219 U. S. 219, 31 S. Ct. 145, 55 L. Ed. 191."

The manifest general purpose of Section 6 is to make responsibility or liability for any unlawful act done in carrying out union objectives and resulting labor disputes arise solely from personal acts, through "actual participation", "actual authorization", or "ratification . . . after actual knowledge".

The common denominator in the above phrases through which the jurisdiction or authority of the Court may attach to enforce responsibility or liability is the word "actual". The word has its genesis in activity, fact and reality (Webster's New International Dictionary, p. 24).

Used in conjunction with the word "participation" it means to actively take part in the unlawful act (Webster's New International Dictionary, p. 1573).

The phrase "actual authority" has received varying definitions under the law of agency. Regardless of shades of meaning it is essentially power actually granted.[1] It must be evidenced by the conduct of the principal, and not the acts or words of the agent.[2] It is also trite to point out that authorization to do an unlawful act cannot be implied from the authority given to do a lawful act.[3]

It is to be observed that Section 6 deals specifically with so-called "unlawful acts". The words "actual authorization of such (unlawful) acts", couple the required authorization directly with the unlawful acts so as to predicate responsibility solely upon a direct and intentional authorization of such specific acts. Some courts had been prone to regard violence and other unlawful acts as incidents to strikes and other conventional union methods, and therefore within the scope of such activities. See Frankfurter and Greene, The Labor Injunction, pp. 74, 75.

The same strict prerequisite is again bespoken by the language of the last condition upon which responsibility can attach, *i. e.*, "ratification of such acts after actual knowledge thereof".

"Ratification" may generally be defined as the subsequent adoption and affirmance by one of an act which another has previously assumed to do for him without authority. Such a confirmation involves an intentional acting upon full knowledge of all material facts.[4]

Explicit in Section 6, then, is the mandate that culpability of any union individual or entity, participating or

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1. 2 Corpus Juris Sec., p. 1184 et seq., Sec. 91, subsec. C(1) (2). 2 Amer. Jur., p. 68 et seq., Secs. 85, 86, 87. 2 Words and Phrases, Permanent Ed., p. 214.

2. Cox v. Pabst Brewing Co., 128 F. 2d, 468, 472 (C.C.A. 10—1942).

3. Call v. Palmer, 116 U.S. 98.

4. Mechem on Agency, 2d Ed., Vol. I, p. 260, Sec. 347. 2 Corp. Jur. Sec., 1068, Sec. 34. 2 Amer. Jur. 165, Sec. 208. 36 Words and Phrases, Permanent Ed., pp. 119, 132.

interested in a labor dispute, shall be personal. To be responsible for the act of another, such a defendant must command or procure the unlawful act, or adopt it by ratification.

It is not an answer to say that at the outset of its charge the Trial Court gave the conventional general instruction about reasonable doubt. The Trial Court's viewpoint was that Section 6 and the formula therein contained had no bearing on the case and was no part of the law to be given to the jury. It not only failed to mention that section and its formula in its affirmative charge, but it refused the Union's various requests, expressed both in the language of the section and in paraphrase, that that section and its formula be placed before the jury as expressive of the legal tests conditioning a finding of criminal responsibility. Thus, the fallacy in the Trial Court's view of the law and the crucial prejudice resulting therefrom went far too deep to be cured or even affected by any conventional generality as to the requirement of proof beyond a reasonable doubt.

The Trial Court did not give that general instruction with any specific reference to the basic issue of a union's criminal responsibility for the unlawful acts of its officers; and, when that issue was reached in the course of its charge, the Trial Court threw aside Section 6 and the tests and conditions therein formulated and substituted an altogether different concept, to wit: the civil concept of the principal's imputed responsibility for the acts of an agent. Indeed, the Court did not even require that the proof measure up to the full test in a civil case, for the Court expressly authorized the jury to convict a defendant union of criminal responsibility merely because of an act which the agent "assumed" to do for his principal.

(2) Section 6, as related to Section 13(b) of the Norris-LaGuardia Act, clearly embraces the activities of petitioners here involved.

The application of Section 6 is expressly made dependent upon participation or interest in a labor dispute. Following the designation of what cases shall be held to grow out of a labor dispute in Section 13 (a), we find the participants in a labor dispute defined in Section 13 (b) as follows:

> "(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

The structure of the opening sentence of this paragraph patently is linked in a definitive way to the persons referred to in Sections 4 and 5 as person or persons participating or interested in a labor dispute. Follows an extremely far-reaching designation of the industrial or occupational area within which participation or interest can arise.

The history of this legislation, and the general and inclusive nature of the terms employed in the statute, denote the design to avoid emasculating narrowness of interpretation. Nor has it ever been strictly construed as it affects the rights of workers.[5]

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5. Lauf v. E. G. Shinner and Co., 303 U.S. 323, 329; New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 560; Drivers' Union v. Lake Valley Co., 311 U.S. 91; United States v. Hutcheson, 312 U.S. 219.

The language of Section 13 (b) is in no sense restrictive in its own content, nor in its relation to other sections of the Act, except as it defines the extensive area within which participation or interest in a labor dispute may exist. It is to be noted that such participation or interest is not gauged therein by the conduct of the party concerned, but by the fact of being engaged in the same industry, trade, craft or occupation in which the dispute occurs.

Section 6 plainly covers all character of union organizations, or members thereof, engaged in the same industry, trade, craft, or occupation in which a labor dispute occurs. In fact, it extends to a party with only an indirect interest therein.

Respondent's brief on the former argument, pages 21, 26-28, concedes that these petitioners acted in a labor dispute not only with the Bay Area employers but with others outside the State.

There is simply nothing, therefore, in the text of Sections 6 and 13(b) as interrelated, or as separate integral parts of the Norris-LaGuardia Act, which suggests a doubt as to the application of Section 6 to petitioners in this case. Under settled rules of construction for the statute, rights thereunder should be given fullest scope, particularly in a criminal case of this nature.

(3) The words "association or organization" appearing in Section 6, as related to Section 13(b), include unions of the character of petitioners.

Expressly and implicitly throughout the Norris-LaGuardia Act runs the theme of the worker's right to self-organization and concerted action. It is common knowledge that an unincorporated association is the customary form of union organization.

Such is the character of petitioners The Bay Counties District Council of Carpenters of the United Brotherhood

of Carpenters and Joiners of America, The United Brotherhood of Carpenters and Joiners of America, Millmen's Union No. 42 and The United Brotherhood of Carpenters and Joiners of America, Millmen's Union No. 550 (R. 263, 264).

It seems to us beyond doubt that all of the benefits of the Norris-LaGuardia Act extend to any form of union organization or entity which is legally recognized, whether unincorporated or corporate. In any event, Sections 6 and 13 (b) make common use of the term "association".

We presume that discussion is not desired concerning the application of Section 6 to an employer association, or person connected therewith, since no trial question affecting employers is before the Court.

(4) The Court erred in the oral charges as to the responsibility of the unions for the acts of their agents and in refusals to charge upon the subject-matter of Section 6 of the Norris-LaGuardia Act for the benefit of all of these petitioners.

(a) The Union Organizations

As applied to the three petitioners which are union associations, the Court instructed the jury that "The act of an agent done for or on behalf of a • • • (association) and within the scope of his authority, or an act which an agent has assumed to do for a • • • (association) while performing duties actually delegated to him, is deemed to be the act of the • • • (association)" (R. 1532, 1137, 1138).

For the benefit of the unions, the following instructions were requested and refused, and exception taken:

> "You are instructed that an officer of a union which is an unincorporated association is not authorized merely by virtue of his office to make his union a party to an unlawful conspiracy. In order to bind

any union organization, therefore, by the act of a representative or officer it is necessary to find that the union had authorized or ratified the act," (R. 1532, 1172).

"You are instructed that no labor union or organization can be found guilty in this case for an unlawful act or acts, if any, of individual officers, members or agents, unless you find upon clear proof from the evidence that such labor organization actually participated in, or actually authorized such unlawful act, if any, or ratified such an act, if any, after actual knowledge thereof" (R. 1532, 1173).

It is apparent that the Court rejected instructions expressly patterned upon the language of Section 6 and failed to give the equivalent. On the contrary, the Court charged that the unions would be responsible as their own act for the act of an agent done for or on behalf of the union and within the scope of his authority, *or* an act which an agent had *assumed* to do while performing duties *actually delegated* to him. Here we find the converse of what is required by Section 6. Indeed, entirely removed and apart from the Norris-LaGuardia Act, the instruction proclaims the insupportable doctrine that an agent can assume to make his principal a party to a crime. By coupling the word "assumed" with the words "actually delegated" the language serves to set apart the act thus "assumed" and remove and distinguish it from the authority "actually delegated". To "assume" is "to take to or upon one's self", "to pretend to possess; to take in appearance only; feign". It is akin to "supposed", "pretended" or "make-believe" (Webster's New International Dictionary, p. 141). Acts which one "assumes" to do approach being the opposite of acts actually "authorized" by another.

(b) The Individual Union Members and Officers

The Court likewise erred in denying application of Section 6 for the benefit of petitioners who are union members or officers. Such an instruction was requested in the following form:

> "You are instructed that no individual defendant who is an officer or member of one of the labor organizations involved can be found guilty in this case for an unlawful act, or acts, if any, of other officers, members or agents of such union organization, except upon clear proof from the evidence that such individual defendant actually participated in or actually authorized such an act or ratified such unlawful act, if any, after actual knowledge thereof" (R. 1533, 1174).

This instruction was refused and no other instruction framed upon Section 6 of the Norris-LaGuardia Act was given. Instead the jury was charged only upon general principles of conspiracy, without any qualification worked by the Norris-LaGuardia Act in a case of this nature.

Whether tested by the provisions of Section 6 of the Norris-LaGuardia Act, or by general principles well-settled in criminal law, the instructions and refusals to instruct were basic error. (*United States* v. *Int. Fur Workers Union*, 100 F. 2d 541; 5[illegible] (C.C.A. 2—1938); *Truck Drivers Local No. 421, etc.* v. *United States*, 128 F. 2d 227, 235 (C.C.A. 8—1942); *United States* v. *Food and Grocery Bureau of So. Calif.*, 43 F. Supp. 966, 971 (S. D. Calif. 1942); 22 Corpus Juris Secundum, p. 149, §84.)

(c) The instructions and refusals to instruct were in this regard extremely prejudicial to each of these petitioners.

As we read the decision in *Allen Bradley Company* v. *Local Union No. 3, International Brotherhood of Electrical Workers*, 89 Law. ed. Advance Opinions 1441, a closed shop agreement, both as to men and materials, is un-

questionably legal. It is only when the employer-employee understandings look not merely to terms and conditions of employment but also to price and market control that illegality arises.

The line of demarcation in union conduct is between activity directed to terms and conditions of employment, and activity in assistance of a non-labor group which purposes "employer-help" in controlling markets and prices. Existence of a purpose to aid and abet manufacturers or traders in doing the things prohibited by the Sherman Act must then be the ultimate test of union guilt. A purpose to unionize, standardize wages upward, and to combat substandard goods in the process, or a purpose to aid and abet employers in controlling markets and prices becomes the determinative question. Terms and conditions of employment inherently involve an agreement and understanding between employers and employees. Successful union activity must comprehend the consummation of its objectives in such an agreement. In this situation it was of the utmost importance to each defendant that his or its responsibility be judged under the light of clear definition of applicable rules of law.

(d) Consideration of the evidence affecting the local unions on the issue of guilt by imputation

In discussing the state of the evidence as to each defendant on the issue of responsibility for the acts of others, these petitioners fall naturally into two classes. One group is the local unions, and the other the individual members or officers thereof.

Composing the first, is the Bay Counties District Council of Carpenters of The United Brotherhood of Carpenters and Joiners of America, hereafter called Bay Counties District Council; United Brotherhood of Carpenters and Joiners of America, Millmen's Union No. 42,

hereafter called Local 42; and The United Brotherhood of Carpenters and Joiners of America, Millmen's Union No. 550, hereafter called Local 550.

All are voluntary unincorporated associations (R. 263, 264), affiliated with the United Brotherhood of Carpenters and Joiners of America, an international trade union affiliated with the American Federation of Labor (R. 172).

The two Locals, 42 and 550, are millworker unions (R. 753, 759). The Bay District Council is composed of representation from local unions chartered by the United Brotherhood and located in counties of the Bay Area (R. 415, Ex. 2, p. 3). Among such affiliates are Local 42 (San Francisco) and Local 550 (Alameda).

The evidence on this issue as to these three petitioners is similar and will therefore be discussed together. All necessarily acted in their external business relations through representatives and agents.

Employer contracts with Locals 42 and 550 were submitted to the Bay District Council for approval, and the Secretary of the latter organization helped negotiate such contracts at the request of the local unions involved (R. 829). To become effective such contracts had to be approved by vote of the members of the locals (R. 415, Ex. 2, p. 13).

The evidence relating to the negotiation and approval of the 1936 agreement, and the negotiated and arbitrated agreement of 1938, is summarized in our main brief, pages 10-13.

In conducting employer relations, the unions established a Conference Committee composed of delegates from the local unions involved. This committee in turn selected from its members delegates to constitute a Negotiating Committee which dealt with employers (R. 767, 819). The Negotiating Committee had no power to make a move without approval of the union membership (R. 1007).

In negotiating the 1936 agreement, Locals 42 and 550 were represented by a committee of five, composed of two members from each local and the Secretary of Bay District Counsel. A committee similarly constituted negotiated in 1938 (R. 820), and in the arbitration proceedings two representatives acted,—Ryan, Secretary of Bay District Council, and Kelly, a member of Local 42 (R. 615).

Apart from the negotiation and signing of employer contracts, the business of the unions, including enforcement of the employer contracts, was conducted through the medium of so-called business representatives or agents (R. 778, 930-931).

All of the considerable volume of evidence related directly or indirectly to activities of these local unions, so that it is obviously impractical to attempt to detail it for the purpose of this discussion. Its general scope may be summarized, as follows:

First, we have the 1936 and 1938 contracts containing the restrictive provisions as to the use of men and material, together with testimony covering the negotiations and arbitration incident to the execution thereof.

Then we have evidence of union activities, all involving lawful methods, as revealed by union minutes, testimony as to conduct of union officials and members, or correspondence sent or received by such officials or members.

Under any interpretation, the evidence shows nothing more than either enforcement of the union stamp, or of the contract provisions, containing the policy not to work on substandard material as measured by the working conditions of the agreements.

The minutes of the unions affirmatively show that as to the 1936 agreement, wherein the callenged restrictive clause was first included, the membership considered it on the floor of the union only as a closed-shop agreement, and the wage scale was accepted after the most bitter controversy between union members. In fact, the vote

of Local 42 was 242 against and 90 for acceptance of the agreement. It was approved by the combined vote of the two locals only because of the overwhelmingly favorable vote of Local 550, Alameda County having been almost totally unorganized until gaining closed shop provisions under this 1936 agreement (R. pp. 1018-1023, 813, 814, 427, 759). The 1938 agreement, carrying forward a similar provision, was based upon arbitration of the wage scale (R. 614-617, 768, 770).

Every union activity during the period of the indictment related to the creation and maintenance of proper working conditions, and the effecting of labor objectives in connection therewith.

If any act of a union representative could be construed as supporting a finding that it was done in combination with employers with a purpose of aiding and abetting those employers in doing a thing violating the Sherman Act, that consequence would show the vital importance to the union organizations to have the issue of their responsibility for such an act sharply and clearly defined. The unions suffered extreme prejudice when the jury was not told that their responsibility for an unlawful act of a representative or agent must rest upon actual authorization, or ratification after actual knowledge, but instead was instructed that they would be liable for an act an agent had "assumed" to do while performing duties actually delegated to him.

(e) Consideration of the evidence affecting the individual defendants on the issue of responsibility for the acts of others

The conventional union conduct involved here could be unlawful only by reason of participating in an illegal combination of employers. Yet, in a joint, concerted act, one individual might act as a part of, and another wholly apart from, an employer conspiracy. This demonstrates the need for judging individual guilt or innocence

under the qualifications worked by the Norris-LaGuardia Act upon the general rules of conspiracy. It is imperative that the case of each individual defendant be analyzed solely from the standpoint of personal conduct, and not merely as concerted activity in combination with a fellow union member who may or may not be engaged in an unlawful conspiracy with employers. In other words, an unlawful purpose of one should not be imputed to another because of a combined and concerted act, identical in all respects except for employer connection.

This is all very close to the core of the public policy proclaimed by the Norris-LaGuardia Act. There the necessity is declared, and the right sought to be effectuated, for full freedom of workers to combine and engage in concerted action, all with reference to the establishment between employers and employees of proper terms and conditions of employment. The act gives realistic recognition to the nature and characteristics of the industrial strife. The command is clear that a participant in the arena shall answer for his own conduct alone—that responsibility for unlawful acts shall be strictly personal. In coordinating any conflict of policy expressed by the Sherman, Clayton and Norris-LaGuardia Acts, there is clearly no difficulty in following the letter and spirit of this requirement. If individual workers, or union organizations, are to be circumscribed by the fear that they are responsible for an ulterior purpose which may attend the conduct of another with whom they are necessarily combined, it serves to strangle without reason the basic purpose of the statute.

An examination of the state of the evidence as it affects each individual reveals what is inherent in union conduct of the nature involved. Common to each defendant was concerted activity in combination with fellow union members and officers. The relevancy to each of the tests prescribed by Section 6 of the Norris-LaGuardia Act is clear.

(e-1) Petitioner J. F. Cambiano

The substance of the evidence affecting this defendant is that he was an organizer for the United Brotherhood of Carpenters and Joiners of America. He was delegated by the General President of the United Brotherhood to assist the local unions in straightening out differences with Pacific Manufacturing Company of Santa Clara, in its relation to the 1938 arbitration award of $9.00, while that company was paying $8.00. The result was the six-county setup at a uniform rate of $8.50 per day (R. 1034, 1035).

The activities of this defendant related to that dispute following the 1938 arbitration award recognized by San Francisco, and claimed by the unions also to be binding upon Alameda. He participated in formulating a policy among the local unions involved to settle the dispute, and then assisted the representatives of the local unions in negotiating the contracts which effectuated the policy through the six-county setup. Santa Clara and Contra Costa Counties were thereby brought in under contracts substantially uniform with the bay area counties of San Francisco, Alameda, San Mateo and Marin which were under the jurisdiction of the Bay District Council (R. 1033-1114).

(e-2) Petitioner C. H. Irish

This defendant was a member of Local 550, employed as a millworker. He was president of the local for the year starting July, 1938. He acted as a member of the Conference and Negotiating Committees for his union in 1938. As a member of the Negotiating Committee he signed the memorandum to submit the unsettled questions to an arbitrator, and as a negotiator, signed the 1938 contract which followed the arbitration (R. 1005-1013, 290, 291).

(e-3) Petitioner W. P. Kelly

He was a millman by trade and belonged to Local 42. He served as a negotiator for Local 42 in 1936 and 1938 (R. 753, 767). He signed the agreement for arbitration in 1938 in behalf of Local 42 (R. 768-770), and acted for the unions on the arbitration board as technical advisor (R. 771). In conjunction with other union members he spoke at the meeting of Local No. 550, prior to the vote upon approval of the 1936 contract (R. 427), and he signed such contract in behalf of Local No. 42 (R. 287). He also signed the negotiated and arbitrated agreement of 1938 in behalf of Local No. 42 (R. 290).

(e-4) Petitioner Emil H. Ovenberg

He was a millworker employed at his trade and a member of Local No. 550 (R. 812). He, with one other, acted on the Negotiating Committee for his local in 1936 (R. 815), and signed the 1936 contract in behalf of Local 550 (R. 287). He was also a member of the so-called Conference Committee consisting of representatives from Local 550 and Local 42 (R. 819), and a member of the Joint Committee between employers and employees. This was set up under the terms of the agreement to iron out disputes between employers and the unions arising under the agreement (R. 819). He also acted for Local 550 in the 1938 negotiations (R. 820). He signed for it the agreement to arbitrate (R. 768-770), and also the negotiated and arbitrated agreement (R. 291).

(e-5) Petitioner W. L. Wilcox

This defendant was a millman belonging to Local 42. He was elected business representative in June, 1938 for a year; was elected president in 1939 and served for a year, was re-elected business agent in 1940 and had acted as such to the time of trial (R. 930).

He took no part in the negotiation of the 1938 agreement, nor the arbitration proceedings. He signed the 1938 negotiated and arbitrated agreement for his local as business agent (R. 931, 290). His activities as business agent as reflected in certain union minutes referred to non-union material (R. 932).

(e-6) Petitioner Charles Roe

We will state the substance of the evidence affecting this defendant with more particularity, because it involves an isolated joint act, allegedly an overt one under the claimed conspiracy, and illustrates how different factors may actuate the same combined and concerted union activity.

The prosecution witness, Harvey Brown, a dealer for Aladdin Lumber Company of Portland, represented them as salesman for ready-cut homes. He met defendant Roe about March 1, 1940, when the latter came to the witness Brown's office, with a gentleman introduced as McGinnis, a representative or secretary of a carpenter union. Brown testified that defendant Roe interrogated him as to the savings by the ready-cut system and was told approximately twenty per cent. That Roe then said in general effect that such would affect their labor setup by reducing the amount of labor, that they had stopped other companies from building ready-cut houses locally, and that he was virtually telling him he could not bring in ready-cut houses. That if they were brought in union labor would not put them up. That Roe asked if the lumber had a union label on it and was told it did. That after such meeting he did not see Roe again. That shortly after he received a summons to come to Alameda Construction and Building Trades Council for a meeting and attended. He only saw one man seen before Mr. McGinnis. There were about twenty-five others there—understood to be business agents.

He was asked about his business connection with Aladdin Company and the union label and the mill in Portland. The purpose was whether the Aladdin Company should be placed on the blacklist or "we do not patronize list" in Oakland—for the reason stated because they were non-union in the mill and didn't pay the same wage scale as in Oakland. He received no word as to the decision and had no further contact with Roe or the other persons (R. 343-347).

Defendant Roe's own testimony was to the following effect. That he was and had been a member of carpenter locals, but not a millmen's local. (No carpenter local is involved in the case.) That while a member of carpenter local 1622 it became affiliated with Alameda County Building and Construction Trades Council and he became assistant representative of the latter organization. His duties were to assist negotiating committees and cooperate with various crafts affiliated with the Council. He was not a member of any negotiating or conference committee of defendant millmen's locals 42 or 550. He had nothing to do with any of the contracts involved and during 1936 to 1940 he did not serve in any position in behalf of local 42 or 550.

That he recalled the meeting with Mr. Brown early in 1940. Walter O'Leary was present. He asked Brown the method of operating Aladdin Ready-Cut House Company. That Brown stated they were union but he had never heard of them being union and after the conversation he sent Brown a citation to appear before the Board of Business Agents of the Building Trades Council. That he, Roe, was unable to appear at the meeting, being out of town. That his conversation with Brown was along the line of organization—and whether the product bore the label. Brown stated it did—with studdings, floor joists and so on. That he congratulated Brown because the Brotherhood never put it on that type of product. That he discussed the erection and labor supply. That Brown

stated they contracted it out, which made it a piece-work proposition against the rules of Bay District Council. That then Roe stated under that condition they could bring in all they wanted, but the carpenters would not furnish carpenters for it. That he absolutely didn't state to Brown his company would not be allowed to ship their products into this area. That he didn't see Brown again but reported to the Council on the meeting and the way he was operating. That he had determined the status of the company and they were still operating one hundred per cent non-union. There was no action by the Building Trades Council.

That he had not heard of, or known of, nor had he been a party to any secret agreement or understanding between the labor and employer defendants with respect to mill work coming into California from outside the State (R. 1024-1027).

On cross examination, that he had never been employed by Local 42 or 550. He gathered information for the negotiating committee of Local 550 for a very short time, four or five weeks, as an investigator. That he might have been called a special business agent by a Recording Secretary.

His meeting with Brown was the early part of 1940. He asked O'Leary to go along because he had some business in that part of town and they made the trip at the same time.

That he noticed Brown running an advertisement he had a ready-cut house, union made, and to his knowledge there were none manufactured in the United States under union conditions. That he arranged the appointment to discuss the labor problem (R. 1027-1029).

Here we have combined action of the defendant Roe with defendant Walter O'Leary. The latter was a business agent for Local 550 and represented that union in connection with the 1936 and 1938 employer contracts. He was one of the three defendants held by the Circuit Court

of Appeals to be immune from prosecution because of compulsory testimony before the grand jury (R. 981-1004). On the other hand, defendant Roe was not representing Local 550 and had no connection with either contract. By nature, the activity of either could be, and at the same time that of the other not, a part of an unlawful combination with employers. It was the right of the defendant Roe, and of each defendant, to have his or its conduct judged under the prerequisites of Section 6 of the Norris-LaGuardia Act.

CONCLUSION

The judgments as to these petitioners should be reversed.

April 1, 1946.

Respectfully submitted,

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